

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 13, 2014

v

RAYSHAWN WILCOX,

Defendant-Appellant.

No. 313547
Wayne Circuit Court
LC No. 12-006125-FH

Before: SERVITTO, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227(2), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent prison terms of 2 to 10 years each for the felon-in-possession and CCW convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. We affirm defendant's convictions, but remand for the limited purpose of correcting the judgment of sentence to reflect that the felony-firearm sentence should run consecutive only to the felon-in-possession sentence, and should run concurrent to the sentence for CCW.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On May 31, 2012, at approximately 12:40 a.m., Detroit Police officers attempted a traffic stop of a vehicle that was traveling 60 miles an hour in a 30 mph zone. The vehicle accelerated, ran a red light, and crashed into a Dodge Ram pickup truck. A police officer observed defendant jump from the driver's seat of the vehicle and toss a handgun onto the driver's side floorboard before fleeing on foot. Officers later arrested defendant in a vacant house near the accident scene. Defendant was charged with felon in possession of a firearm, CCW, and felony-firearm. The jury convicted defendant of all three offenses.

II. DOUBLE JEOPARDY

Defendant first argues that his cumulative punishments for CCW and felony-firearm, and for felony-firearm and felon in possession of a firearm, violate his double jeopardy protection against multiple punishments for the same offense. Because defendant did not raise this double

jeopardy issue in the trial court, we review this issue for plain error affecting defendant's substantial rights. *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008).

Both the United States and Michigan constitutions protect a defendant from being placed twice in jeopardy, or subject to multiple punishments, for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007). The double jeopardy protection against multiple punishments for the same offense is not a limitation on the Legislature's power to define crime and fix punishment. *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003). It is only a restriction on a court's ability to impose more punishment than intended by the Legislature. *Smith*, 478 Mich at 316; *Calloway*, 469 Mich 451. Thus, where the Legislature has expressed a clear intention to impose multiple punishments, imposition of those punishments does not violate the Constitution, even if two crimes are the same. *Smith*, 478 Mich at 316; *Calloway*, 469 Mich 451. But where the Legislature's intention to impose multiple punishments is unclear, a court must determine whether two offenses are the same under the *Blockburger*¹ "same elements" test. *Smith*, 478 Mich at 316. Under that test, two offenses do not constitute the same offense for purposes of the multiple punishment strand of double jeopardy if each requires proof of an element that the other does not. *Id.* at 305, 316.

The felony-firearm statute provides, in relevant part:

(1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, *except a violation of section 223, section 227, 227a or 230*, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this subsection, the person shall be imprisoned for 10 years. [MCL 750.227b(1) (emphasis added).]

As defendant correctly observes, he could not lawfully be convicted of felony-firearm on the basis of his commission of CCW, MCL 750.227, because the felony-firearm statute expressly provides that it does not apply to a violation of that statute. In this case, however, CCW did not serve as the underlying felony for defendant's felony-firearm charge. Rather, felon in possession of a firearm served as the predicate felony for the felony-firearm charge. A defendant properly may be convicted of both CCW and felony-firearm when CCW is not the predicate of the felony-firearm offense. *People v Sturgis*, 427 Mich 392, 410; 397 NW2d 783 (1986). The issue thus becomes whether defendant's protection from double jeopardy is violated by convictions for both felon in possession of a firearm and felony-firearm.

Our Supreme Court squarely addressed this exact issue in *Calloway*, 469 Mich at 452, and concluded that multiple convictions for both felony-firearm and felon in possession of a firearm do not violate the double jeopardy protection against multiple punishments for the same offense. The Court explained:

¹ *Blockburger v United States*, 284 US 299, 304; 52 SC 180; 76 L Ed 306 (1932).

In considering MCL 750.227b in [*People v*] *Mitchell*, [456 Mich 693; 575 NW2d 283 (1998),] we concluded that, with the exception of the four enumerated felonies, it was the Legislatures intent “to provide for an additional felony charge and sentence whenever a person possessing a firearm committed a felony other than those four explicitly enumerated in the felony-firearm statute.” *Id.* at 698.

We follow . . . our *Mitchell* opinion in resolving this matter. Because the felon in possession charge is not one of the felony exceptions in the statute, it is clear that defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession, MCL 750.224f, and felony-firearm, MCL 750.227b. Because there is no violation of the double jeopardy clause, the Court of Appeals properly affirmed defendant’s convictions. [*Calloway*, 469 Mich at 452.]

The Supreme Court’s decision in *Calloway* is based on its conclusion that the Legislature intended to permit cumulative punishment for both felon in possession of a firearm and felony-firearm. This ends the double jeopardy inquiry and it is not necessary to determine whether the two offenses are the same offense under the *Blockburger* test. *Calloway*, 469 Mich at 451.

Accordingly, because defendant’s convictions for felon in possession of a firearm and felony-firearm do not violate the double jeopardy protection against multiple punishments for the same offense, and because defendant properly may be convicted of both CCW and felony-firearm where another felony is the predicate for the felony-firearm offense, we reject defendant’s argument that his cumulative punishments for CCW, felon in possession of a firearm, and felony-firearm are not constitutionally permitted. There is no error, plain or otherwise.

III. JURY INSTRUCTIONS

Defendant next argues that the trial court erred by failing to instruct the jury that he must have *knowingly* possessed a firearm in order to be guilty of felon in possession of a firearm. Because defense counsel affirmatively expressed satisfaction with the trial court’s jury instructions as given, any error is waived. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). A waiver extinguishes any error, leaving no error to review. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Even if this issue had not been waived, defendant would not be entitled to relief. Because the issue is unpreserved, defendant has the burden of establishing a plain error affecting defendant’s substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

Although the trial court failed to instruct the jury that defendant’s knowledge of the gun was necessary to convict him of felon in possession of a firearm, the court instructed the jury that defendant’s knowledge of the gun was an essential element of both CCW and felony-firearm. Because the jury found defendant guilty of those two offenses, it necessarily found that he had knowledge of the gun. Under these circumstances, any error in failing to instruct the jury on knowing possession in relation to the felon-in-possession charge did not affect defendant’s substantial rights. Therefore, defendant is not entitled to relief.

III. CONSECUTIVE SENTENCING

The prosecution concedes, and we agree, that the trial court erred by ordering defendant's felony-firearm sentence to be served consecutive to his sentence for CCW. Absent express statutory authorization, all sentences in Michigan must run concurrently. *People v Sawyer*, 410 Mich 531, 534; 302 NW2d 534 (1981). Although the felony-firearm statute provides that a felony-firearm sentence "shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony," CCW is one of the listed exceptions to the felony-firearm statute. Therefore, defendant's sentences for felony-firearm and CCW may not be consecutive, although the former may be consecutive to the felon in possession sentence. Accordingly, we remand this case for the limited purpose of correcting the judgment of sentence to reflect that the felony-firearm sentence should run consecutive only to the felon-in-possession sentence, and should run concurrent to the sentence for CCW.

Affirmed in part and remanded for the limited purpose of correcting defendant's judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ David H. Sawyer

/s/ Mark T. Boonstra